Supreme Court, U.S.
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No. 94-676

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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CYNTHIA WILLIAMS; LORENZO HARRIS; SHELLY HILL; HALLIE CLOUD; FRELANDER YARBROUGH, JR.,; DONALD JACKSON; CLYDE WARNER; DWJANA LAWSON JACKIE MARTIN; HUEY CUNNINGHAM; JULIUS J. LARRY, III; AND JUSTICE CENTER - HOUSTON,
*Petitioners*

vs.

PHILLIPS PETROLEUM COMPANY;
W. WAYNE ALLEN; and C.J. SILAS
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the petitioners have demonstrated that there is a split in the courts of appeals on issues that are necessary to resolve in an appeal of the decision in this case.

2. Whether the petitioners present a question of national significance warranting Supreme Court review.

3. Regardless of whether the question presented by the sanctions imposed by the court of appeals merits Supreme Court review, the petitioners' arguments in their petition are frivolous and deserving of sanctions, and the petitioners' attacks on Circuit Judge Jerry Smith should be stricken from the petition.

## PARTIES TO THE PROCEEDING

| | | |
|---|---|---|
| CYNTHIA WILLIAMS | - | Petitioner |
| LORENZO HARRIS | - | Petitioner |
| SHELLY HILL | - | Petitioner |
| HALLIE CLOUD | - | Petitioner |
| FRELANDER YARBROUGH, JR. | - | Petitioner |
| DONALD JACKSON | - | Petitioner |
| CLYDE WARNER | - | Petitioner |
| DWJANA LAWSON | - | Petitioner |
| JACKIE MARTIN | - | Petitioner |
| HUEY CUNNINGHAM | - | Petitioner |
| JULIUS J. LARRY, III. | - | Petitioner and Attorney for Petitioners |
| JUSTICE CENTER - HOUSTON | - | Law Firm for Petitioners |
| PHILLIPS PETROLEUM COMPANY | - | Respondent |
| W. WAYNE ALLEN | - | Respondent |
| C.J. SILAS | - | Respondent |

## RULE 29.1 LISTING

All of Phillips Petroleum Company's subsidiaries are wholly-owned, except PHILLIPS GAS COMPANY, which has issued its own stock.

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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

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The respondents, Phillips Petroleum Company (Phillips), W. Wayne Allen (Allen), and C.J. Silas (Silas), respectfully request that this Court deny the petition for a writ of certiorari and submit this brief in opposition to the petitioners' petition.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 23 F.3d 930 (5th Cir. 1994), and attached as appendix 1. The respondents attach a copy of the court of appeals decision because the petitioners provided an inaccurate copy of the decision as appendix A to the petition. The decision provided by the petitioners at pages 20a-23a incorrectly reproduced the quotations included at pages 938-40 of the reported opinion. The final summary judgment and order of summary judgment by the district court is not reported. The respondents provide a complete version of the order and final judgment as appendix 2. The petitioners provided an incomplete version of the order and final judgment as appendix B to the original petition. A revised petition included a complete version of the order and final judgment as appendix B.

## JURISDICTION

The petitioners seek jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on June 24, 1994. The petitioners filed their petition for a writ of certiorari on September 22, 1994. The petitioners have failed to articulate a justification of national importance for the Court to grant certiorari under 28 U.S.C. § 1254(1).

## STATUTES OR OTHER PROVISIONS INVOLVED

1. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09 (WARN). In particular, 29 U.S.C. § 2101(a)(3)(definition of "mass layoff") and 29 U.S.C. § 2102 (requirement of sixty-day written notice of a mass layoff at a "single site of employment") are applicable to the petition. The regulations interpreting the

term "single site of employment" used in the definition of mass layoff are contained at 20 C.F.R. § 639.3(i).

2. Rule 56 of the Federal Rules of Civil Procedure relating to summary judgments.

3. Rule 38 of the Federal Rules of Appellate Procedure relating to sanctions for frivolous appeals.

## STATEMENT OF THE CASE

The opinion of the court of appeals, 23 F.3d at 932-33, contains the facts necessary for the Court to determine whether to grant a writ of certiorari on the questions presented. The petitioners originally filed their petition on September 22, 1994. The petitioners filed a corrected petition that respondents received on October 10, 1994. The corrected petition included a page from the district court's order of summary judgment that was not included in appendix B to the original petition. The corrected petition also revised the questions presented and a topic heading to change the amount of sanctions imposed against the petitioners from $46,000 to $94,323.50. *See* Petitions at pp. i, 20. The petitioners did not move for leave to file the corrected petition.

The petitioners' statement of the case contains numerous inaccuracies regarding the facts of the case and the proceedings in the lower courts. None of the original plaintiffs in this lawsuit, Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, Frelander Yarbrough, Jr., and Donald Jackson (the Houston petitioners), worked for Phillips Petroleum Company (Phillips) in Bartlesville, Oklahoma as is implied by the petitioners' statement of the case. *See* Petition at p. 3. The Houston petitioners all worked for Phillips or subsidiaries in the Houston, Texas metropolitan area. The

other petitioners who were former Phillips employees, Clyde Warner, Dwjana Lawson, Jackie Martin, and Huey Cunningham (the Bartlesville petitioners), worked for Phillips in Bartlesville, Oklahoma. Phillips provided the Bartlesville petitioners sixty-day advance written notices of their March 1992 layoffs, but did not provide the Houston petitioners advance written notice because WARN did not require such notice. Therefore, the petitioners incorrectly assert in the first paragraph of the statement of the case that Phillips did not provide sixty-day advance notice of layoffs to all petitioners. *Id.*

In addition, the Bartlesville petitioners never have been parties to this lawsuit. The petitioners moved to join the Bartlesville petitioners to the lawsuit *after* the district court rendered summary judgment. The district court denied the petitioners' motion to join the Bartlesville petitioners in a separate order from the order of final judgment. The petitioners did not appeal the order denying their attempt to join the Bartlesville petitioners. The court of appeals ruled that the petitioners had not preserved the issue of the joinder of the Bartlesville petitioners for appeal. 23 F.3d at 933. Similarly, the petitioners did not address the court of appeals' decision regarding the district court's order on the joinder of the Bartlesville petitioners in their petition to this Court. Therefore, the issue of the joinder of the Bartlesville petitioners is not before this Court, and the petitioners erroneously have included the Bartlesville petitioners as parties. *Id.*

The petitioners assert that at the time they signed their releases they were "not aware or had any reason to believe that they had a cause of action or claim against Phillips, other than the plant explosion claims." *Id.* The petitioners' claims under WARN all relate to their layoffs from Phillips. There

is no dispute that the petitioners all knew before they signed their releases that they had been or would be laid off by Phillips. The petitioners' references to "plant explosion claims" refers to claims that several of the petitioners asserted against Phillips based on an explosion that occurred at Phillips' Houston Chemical Complex in October of 1989. The petitioners have not referenced the plant explosion previously in this case, and the event has no relevance to the petitioners' claims under WARN.

The petitioners further reference charges of discrimination that they filed with the Equal Employment Opportunity Commission (EEOC) and subsequent actions by the EEOC. *See* Petition at pp. 3-4. There is no provision under WARN requiring a party to file a charge of discrimination with the EEOC prior to bringing WARN claims. Moreover, the petitioners do not assert race and age discrimination claims against the respondents in this lawsuit. Thus, the petitioners' references to actions by the EEOC and employment discrimination claims are irrelevant.

Regarding the issue of sanctions imposed by the court of appeals against the Houston petitioners, petitioner Julius J. Larry, III (Larry) (petitioners' counsel in the lower courts), and petitioner Justice Center - Houston, the court of appeals provided a summary of the petitioners' actions in section V of the opinion located at 23 F.3d at 938-41. The petitioners declare in their petition that Larry has "paid the mandate to Phillips' counsel and tendered the full amount assessed at the district court and appellate court." The petitioners claimed in their original petition that they received sanctions of over $46,000, while in their corrected petition they claim the sanctions were $94,323.50. *See* Original and Corrected Petitions at pp. i, 3-4, 20. These allegations by the petitioners are distortions of the truth. The court of appeals imposed

$23,491.02 in sanctions against the Houston petitioners, petitioner Larry, and Justice Center - Houston (Larry's former employer). These sanctions included $20,000 for attorneys fees on appeal, $3,039.22 for expenses on appeal, and $451.80 for double costs. 23 F.3d at 941. After the court of appeals issued its decision, Larry sent respondents' counsel a July 18, 1994 letter by facsimile referring to the court of appeals as "intellectual pygmies" and stating that he had enclosed checks for the sanctions imposed by the Fifth Circuit. *See* July 18, 1994 letter attached as appendix 3. Larry did not actually send the checks at that time. Respondents' counsel sent further correspondence to Larry requesting payment of the sanctions imposed by the court of appeals. Larry eventually sent Phillips a check for double costs awarded by the court of appeals in the amount of $451.80, and two post-dated checks, one for the $20,000 in attorneys fees and one for the $3,039.22 in expenses on appeal. *See* Checks dated December 31, 1994, which are attached as appendix 4. The respondents have not cashed the post-dated checks.

The district court also assessed $22,972.56 in sanctions against the petitioners after the court of appeals issued its decision. Thus, the sanctions imposed against the petitioners in this case total slightly over $46,000. The petitioners reference this amount of sanctions in their original petition filed on September 22, 1994. *See* Original Petition at pp. i, 20. The petitioners have appealed the order from the district court assessing sanctions which currently is pending before the Fifth Circuit. Despite the petitioners' statement to the contrary in the petition, Larry has not sent Phillips a check for the amount of sanctions imposed by the district court, post-dated or otherwise. In addition, District Judge Norman Black imposed $48,176.65 in sanctions against Larry in *Yarbrough et al. v. Phillips Petroleum Company, et al.*, civil action no. H-93-3592, for filing and pursuing a lawsuit against the same

parties as are respondents in the present matter. The petitioners have not sent the respondents checks for those sanctions. The petitioners refer to sanctions of $94,323.50 in their corrected petition which includes the sanctions imposed by the court of appeals, the district court in this case, and by Judge Black in another case. *See* Corrected Petition at pp. i, 20. Like the sanctions imposed by the district court, the issue of sanctions imposed by Judge Black in the *Yarbrough* case currently is pending before the Fifth Circuit. Accordingly, the sanctions in the amount of $23,491.02 only are pending in this Court, while other sanctions are not before this court.

**REASONS WHY THE PETITION SHOULD BE DENIED**

1. The Petitioners Fail to Demonstrate that there is a Split in the Courts of Appeals on Issues that are Necessary to Resolve an Appeal of the Decision Below.

The petitioners assert that this Court should grant a writ of certiorari because there is a split in the courts of appeals on the issues of ratification of releases and the statute of limitations applicable to WARN actions. *See* Petition at pp. 4-9. The district court rendered summary judgment for the respondents because the petitioners failed to state a claim upon which relief can be granted under WARN and because the petitioners all signed valid releases of their claims. The court of appeals affirmed the district court's decision. 23 F.3d at 934.

Regarding the decision based on the merits of the WARN cause of action, the court of appeals held that Phillips did not lay off enough individuals at the single sites of employment at which the Houston petitioners worked to trigger a requirement for sixty-days written notice under WARN. 23 F.3d at 932-35. WARN requires that at least

fifty employees be laid off at a single site of employment to obligate the employer to provide notice under WARN. 29 U.S.C. § 2101(3). There is no dispute that Phillips did not lay off enough employees at any single site of employment in Houston to obligate Phillips to provide WARN notice. The petitioners have not asserted any dispute among the courts of appeals regarding the definition of a "single site of employment" under WARN that was the basis of the court of appeals decision. Accordingly, there is no split among the circuits on the essential issue in this case.

The petitioners challenge the lower court decisions relating to the releases that the petitioners signed. The district court determined that the petitioners released their claims, and the court of appeals agreed with that decision. *See* appendices 1 and 2. There is no dispute among the parties that the petitioners all signed releases, received adequate consideration for the releases, and breached the terms of the releases by bringing the instant lawsuit. Moreover, petitioners presented no evidentiary materials to the district court that would establish that there was a genuine issue of material fact on the issue of whether the releases were voidable based on fraud, duress, material mistake, or some other defense. As a result, the district court rendered summary judgment, and the court of appeals agreed with that decision.

The court of appeals included two short paragraphs in its opinion relating to the ratification issue, that were not necessary to the decision because the court of appeals decided the case based on the merits of the petitioners' claims under WARN and because the petitioners never established that the releases were voidable. 23 F.3d at 937. The petitioners are correct that there are a variety of decisions from the circuit courts regarding the issue of whether a voidable release is ratified if the releasor fails to return the consideration paid for

the release at the time of filing suit under a federal statute. *See* Petition at p. 5. That issue, however, is not presented by this case because the court of appeals did not have to reach the ratification issue to decide this case. Furthermore, there is no split among the circuits regarding the application of the ratification doctrine to a WARN claim; the court of appeals decision in this case is the only decision on that issue. Accordingly, the petition for a writ of certiorari should be denied.

The petitioners also assert that this Court should grant their petition for a writ of certiorari because there is a split in the courts of appeals regarding the statute of limitations applicable to WARN. *See* Petition at pp. 8-9, 18-21. This issue also was not addressed by the lower court decisions and should not be justification for issuing a writ of certiorari. The court of appeals never mentioned the statute of limitations issue in its opinion. The district court mentioned the statute of limitations issue only in summarizing the arguments made by the respondents for summary judgment. The district court did not render summary judgment based on the statute of limitations.[1] *See* appendices 1 and 2. Since neither lower court decided this case based on the statute of limitations, the case does not provide this Court with a vehicle for addressing the split among the circuit courts of appeals regarding the statute of limitations that should apply to WARN claims.

The petitioners contend that Texas' four-year contract statute of limitations or two-year personal injury statute of

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[1] The original petition filed by the petitioners did not include page 5 of the district court's order of summary judgment. This omission leads one to believe that the statute of limitations was an issue on which the district court based its decision. After the respondents called this omission to their attention, the petitioners corrected this misleading detail when they filed their corrected petition with the proper page included.

limitations should apply to WARN claims rather than the six-month statute of limitations under the National Labor Relations Act, 29 U.S.C. §§ 141-87 (NLRA). *See* Petition at pp. 9, 18-21. The petitioners, however, fail to provide any justification for the application of the two state statutes of limitation to a WARN action. The petitioners assert that the federal courts should apply a federal statute of limitations to WARN only if it provides a "clearly more analogous" limitations period than the state statute and application of the state statute would undermine federal policy. *See* Petition at p. 19. The petitioners argue that the NLRA limitations period is not an exact fit for a statute of limitations, but do not offer any reasons why the state statutes would be preferable. Because the court of appeals did not reach the issue, and the petitioners have not addressed the issue adequately, this case does not present a case demonstrating a split in the circuits even on the issue of the statute of limitations. As a result, the petitioners have failed to offer an adequate justification for the Court to consider this case, and the Court should deny the petition.

2. The Petitioners Fail to Offer an Issue of National Significance Warranting Supreme Court Review.

The petitioners assert that their petition should be granted because the court of appeals decided an important question of federal law in conflict with jurisprudence of the Supreme Court and cited *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), in support of that assertion. *See* Petition at pp. 4-5. More specifically, the petitioners argue that the Fifth Circuit's decision in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), finding ratification in an employment discrimination case when the plaintiffs failed to return the consideration paid for a release at the time they filed suit, is subject to binding authority from the Court under

the Court's decision in *Hogue*. In *Hogue*, the Court held that the plaintiff's failure to return consideration paid for a release of claims under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (FELA), did not constitute a ratification, but that the sum paid could be deducted from any award that the plaintiff recovered on his claim under the FELA. *See* Petition at pp. 6-7, 9-11. As stated previously, the lower courts in this case did not base their decisions on the petitioners' ratification of their releases. Therefore, a conflict between the jurisprudence of the Fifth Circuit and the Supreme Court, even if it did exist, is not presented by this case.

Moreover, this issue does not warrant Supreme Court review because there is not a conflict between the decisions of the Fifth Circuit and the Supreme Court. The *Grillet* and *Hogue* decisions are not necessarily incompatible. The two decisions were based on claims under different federal statutes -- FELA in *Hogue* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (Title VII) in *Grillet*. Neither statute is properly presented to the Court by the petitioners. There also are legitimate reasons for applying the ratification concept to releases of some federal statutes and not others. In particular, the ratification theory should be applied to claims made under WARN. The maximum damage award under WARN is sixty days pay. 29 U.S.C. § 2104. In the instant case, the consideration provided to the petitioners was more than the amount of relief that the petitioners could expect to recover under WARN. The sum paid in consideration for the releases could not be recovered from a later award as was the case in *Hogue* under the FELA. Similarly, the FELA regulates releases while WARN does not. *See* 45 U.S.C. § 55; *Fleming v. U. S. Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), *petition for cert. pending*, 9/14/94. Therefore, *Hogue* is not controlling

precedent for claims under WARN, and it is reasonable to apply the ratification rule to cases under WARN.

Although the Fifth Circuit did not cite *Hogue* in the *Grillet* decision, the Fifth Circuit addressed the issue of whether *Hogue* prevented the application of the ratification doctrine to age discrimination claims in *Wamsley v. Champlin Refining Co.*, 11 F.3d 534 (5th Cir. 1993). The Fifth Circuit in *Wamsley* determined that *Hogue* did not prevent the application of the ratification doctrine to an age discrimination case because the purposes of the FELA addressed in *Hogue* were different than the purposes of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (ADEA), addressed in *Wamsley*. Similarly, the Seventh Circuit Court of Appeals has held that *Hogue* did not prohibit the application of the ratification doctrine to a plaintiff who asserted a claim under Title VII without first returning consideration that she received for a release. *Fleming v. United States Postal Service*, 27 F.3d at 262. *See also O'Shea v. Commercial Credit Corporation*, 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 112 U.S. 1[illegible] (1991). Thus, the petitioners' argument that *Hogue* prevents an application of the ratification doctrine to the petitioners' WARN claim merely because the Court declined to apply the ratification doctrine to a claim under another federal statute should not be a basis on which to consider this case.

The petitioners offer several other arguments in their petition in an apparent effort to demonstrate that this case has sufficient national significance to warrant Supreme Court review. The petitioners list four other cases that are pending before the Fifth Circuit that involve parties asserting a variety of employment claims whose cases were dismissed by federal judges because the plaintiffs signed releases. *See* Petition at pp. 7-8. Two of the cases involve parties to the present case

and the same counsel (*Yarbrough v. Phillips Petroleum Company*, no. 94-20583, and *Williams v. Phillips Petroleum Company*, no. 94-0963). Larry, one of petitioners' counsel in the present case, also represents the appellants in all four cited cases. The petitioners do not provide a reason for listing these other cases pending before the Fifth Circuit. To the extent that the petitioners cite these cases to highlight any alleged national import of the resolution of the ratification issues addressed in the petition, it is a unique tactic for a lawyer to file several frivolous lawsuits and then argue that the issue is one of great importance requiring this Court's attention because of the number of cases pending that involve the issue. The ratification issue is not of great import for anyone but petitioners and their counsel because few, if any, lawyers and parties would file lawsuits when the plaintiffs had signed releases, receive significant consideration for the releases, and had no evidence that the releases were voidable. These arguments fail to demonstrate that the ratification issue is one of such national significance to require this Court's attention.

The petitioners also argue that the requirement imposed by the Fifth Circuit that individuals who sign releases at the time of the termination of their employment tender back the consideration for the releases would have a crippling effect on challenges under the ADEA. *See* Petition at pp. 11-12. The petitioners claim that older people are in a difficult position because they have not built up a retirement "nest egg." *Id.* These arguments have nothing to do with this case and demonstrate the frivolous nature of the petition. This lawsuit involves claims that the respondents violated WARN by failing to give required written notice to employees chosen for layoff. This is not an age discrimination case, and concerns about retirement nest eggs are irrelevant.

Similarly, the petitioners assert that the Congress has a "long-running hostility with ADEA releases," as evidenced by the passage of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA). The petitioners argue that this supports their claims that the ratification rule should not apply to the releases signed by the petitioners. *See* Petition at pp. 12-13. As stated above, the only claims made in this lawsuit arise from the WARN act. There is no allegation of age discrimination made by the petitioners in this lawsuit. Congress's interest in releases of age discrimination claims as evidenced purportedly by the OWBPA is irrelevant to this case. Furthermore, the OWBPA obligates employers to include certain provisions in releases for those releases to effectively waive age discrimination claims. 29 U.S.C. § 626(f). The OWBPA does not obligate employers to meet the listed requirements for the releases to be effective to release claims under WARN. Finally, respondents complied with all of the requirements of the OWBPA when they drafted the releases and presented them to the petitioners. The petitioners did not assert in their petition any violation of the OWBPA. Therefore, the petitioners' arguments relating to the OWBPA cannot demonstrate an issue of national importance sufficient for this Court to grant the petition.

The petitioners assert that the ratification rule utilized in *Grillet* and *Wamsley* is inappropriate because it may be difficult to determine the amount of consideration that should be tendered back at the time a plaintiff files a lawsuit. *See* Petition at p. 13. This argument is sheer speculation and is not justified by the facts and record of this case. The petitioners received calculations sheets of their severance benefits given in exchange for the releases that they signed. The respondents submitted this information to the district court and the court of appeals for those courts' consideration when evaluating the validity of the releases. The petitioners

cannot claim this issue requires Supreme Court consideration when they knew exactly what the consideration was that they received. In addition, the difficulty of calculating the amount to be tendered is academic because the petitioners never tried such a tender.

The petitioners also claim that there is confusion among the states and between the law of some states and the Restatement of Contracts on whether a person can ratify a release under state law by failing to return the consideration at the time of filing suit. *See* Petition at pp. 14-15. There is no dispute among the parties that application of the ratification rule to federal statutes is an issue of federal law. Thus, confusion in the states about application of the ratification rule to releases of state claims is irrelevant. Moreover, this Court does not have jurisdiction to decide issues of state contract law. Therefore, this Court could not resolve confusion among the states on the application of the ratification doctrine to state law claims.

The petitioners further claim that the ratification rule should not have been applied to them on the basis of futility because the respondents never would have accepted their tender back. The petitioners peg the odds at "a million-to-one" that the respondents would have accepted their tender. *See* Petition at p. 16. Again, the petitioners' argument is little more than an academic discussion because the petitioners failed to make the required tender. However, the odds of the respondents accepting the tender are not as petitioners would guess. The petitioners even recognize the economics of such an offer. The court of appeals noted that Houston petitioners would be required to return over $210,000 to the respondents in exchange for the possibility of recovering at most sixty days pay each under WARN. 23 F.3d at 937. The severance

benefits paid to each Houston petitioner were more than sixty days pay.

Next, the petitioners provide a short summary of WARN and conclude that the respondents did not provide the required sixty days notice of the March 1992 layoffs. *See* Petition at pp. 17-18. This summary fails to identify the basis on which the lower courts decided this case in favor of the respondents. As addressed in the factual summary of the Fifth Circuit's opinion, Phillips laid off over 500 people in Bartlesville, Oklahoma and provided those individuals the required sixty-day written notices. The Bartlesville petitioners all received the required notices. Phillips did not lay off 50 employees in the Houston area. Thus, sixty-day written notice was not provided to any individuals laid off in Houston including the Houston Petitioners. WARN requires sixty-day written notice for "mass layoffs" at any "single site of employment" of over 500 employees or 50 employees that comprise one-third of the employees working at that single site of employment. 29 U.S.C. § 2101(a)(3)(B). The petitioners argued in the courts below that Phillips' operations in Bartlesville and Houston comprised a "single site of employment," thus obligating Phillips to provide notice to the individuals laid off in Houston. The lower courts dismissed the absurd notion that two work locations hundreds of miles apart could be considered a "single site of employment," particularly when the petitioners had no evidence that Phillips rotated employees between the sites, the locations shared staff and equipment, or there were any other unusual circumstances that would support classifying the two plants as a single site. 23 F.3d at 934. This case was decided on a set of facts that could not justify a finding of a WARN violation by any reasonable reading of the statute. Therefore, this Court should deny the petition because the questions presented lack

significant national importance that would support Supreme Court review.

3. The Petitioners Fail to Demonstrate that the Sanctions Imposed by the Fifth Circuit Merit Supreme Court Review, the Petitioners' Arguments Regarding Sanctions and Other Issues are Themselves Frivolous and Deserving of Sanctions, and the Petitioners' Attacks on Circuit Judge Smith are Scandalous and Should be Stricken from the Petition.

The court of appeals sua sponte sanctioned the petitioners, including their counsel, for pursuing a frivolous appeal that was "exacerbated by Larry's scurrilous attacks on Phillips's counsel and the district court...." 23 F.3d at 941. Petitioners continue their pattern of conduct by making derisive attacks on Judge Smith, the Fifth Circuit judge who authored the court of appeals opinion. Among other statements, petitioners assert that Judge Smith made an "unwarranted, abusive, personal attack" on Larry, wrote a "scandalous, misleading, inaccurate opinion wherein he outright lied on Petitioners' counsel, while slanting the facts and omitting key facts and issues," attempted "to ruin Petitioners' counsel's career, deliberately omitted key facts and wrongly accused counsel of casting 'brickbats,'" and "deliberately misquoted the time sheets excerpts from counsel's brief...." *See* Petition at pp. 21-22. The petitioners attempt to support these outlandish and inappropriate statements by asserting that Judge Smith omitted petitioners' counsel's cites to the record included after each summation of respondents' counsel's activities and "quoted virtually verbatim" from an April 4, 1994 letter to the court of appeals by the respondents' counsel. *See* Petition at p. 22. There is no support or justification for petitioners' diatribe against Judge Smith. In addition, the petitioners fail to offer

sufficient, adequate, or national reasons for review of these sanctions by the Supreme Court.

A source material for the sanctions eventually imposed on petitioners was respondents' counsel's time sheets. The district court stated in its order of summary judgment that the petitioners' actions were frivolous. Appendix 2 at p. 5. Because of this finding, the respondents moved for attorneys' fees and expenses in their bill of costs.[2] Respondents' counsel attached his time sheets as justification for the request for attorneys fees. Petitioners' counsel made repeated, frivolous claims that respondents' counsel inappropriately lobbied the district court and law clerks based on several references in the time sheets to conversations with court personnel regarding attempts to schedule a discovery conference. In arguing that these contacts were inappropriate, petitioners' counsel in his brief to the Fifth Circuit misquoted opposing counsel's time sheets, omitted critical descriptions of counsel's activities, and drew unsupported conclusions from the time sheet entries. These actions of petitioners' counsel are summarized in the Fifth Circuit's opinion. 23 F.3d at 938-41. The petitioners' counsel apparently seeks to excuse his misleading quotations to respondents' counsel's time sheets by noting that he cited to the page in the record where the full text could be found. *See* Petition at p. 22.

Larry's scandalous and personal attacks on Judge Smith are totally unjustified. Merely citing the record where the full text of the time sheets could be found does not excuse Larry's deliberate attacks on respondents' counsel and

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[2] The local rules for the Southern District of Texas require a party to move for attorneys fees with the bill of costs if the party seeks fees as part of taxable costs. Rule 4 of Local Rules of the United States District Court for the Southern District of Texas.

misrepresentation of the record. As noted in Judge Smith's opinion, Larry misquoted opposing counsel's time sheets, selectively quoted from those time sheets, and drew illogical and unfounded conclusions. 23 F.3d at 938-41. It is impossible to conclude based on Judge Smith's omission regarding citations that Judge Smith made a personal attack on Larry, attempted to ruin Larry's career, and "outright lied on petitioners' counsel," as asserted in the petition. *See* Petition at pp. 20-21. Moreover, two other federal judges joined the opinion authored by Judge Smith. There is not a hint of dissent from the other two judges. Judge Smith and the rest of the panel rendered their decision based on the complete lack of merit in petitioners' case.

Furthermore, the court of appeals' utilization of a April 4, 1994, letter to the court from respondents' counsel does not support petitioners' claims of a personal vendetta by Judge Smith. Respondents' counsel sent a letter dated April 4, 1994 to the court of appeals after the court of appeals requested the parties to be prepared to address the issue of sanctions under Rule 38 of the Federal Rules of Appellate Procedure. *See* Appendix C to the Petition which includes the March 30, 1994, notice. Judge Smith quoted little if any of the letter in the opinion, and where there is any similarity of subject matter, the record supports his conclusions. Petitioners' actions before the district court and court of appeals were frivolous, just as their actions herein merit sanctions. Rule 24.6 of the Supreme Court Rules provides that scandalous matter may be stricken by the Court. The petitioners' attacks on Judge Smith contained in their petition should be stricken by the Court.

The petitioners further argue that their conduct before the court of appeals should be excused and the sanctions reversed because the case involves unsettled issues of law

such as the definition of single site of employment and the application of the ratification doctrine, and issues of first impression such as the statute of limitations applicable to the case. *See* Petition at p. 21. These arguments cannot apply to the facts of this case. There is little case law on the subject of what constitutes a "single site of employment" under WARN, but no reasonable litigant could believe that any court would find workplaces hundreds of miles apart and in two different states to be a single site of employment when the petitioners had no evidence to present that operations in the two sites were interrelated in any way. Moreover, the issue of ratification is not unclear in the Fifth Circuit where *Grillet* and *Wamsley* provide very definite authority on the subject. In addition, the petitioners had to demonstrate that the releases they signed were voidable before they even could get to the issue of ratification. The petitioners filed this lawsuit despite having signed releases with no argument demonstrating that the releases were invalid. This fact itself justifies the court of appeals' sanctions.

Similarly, the uncertainty of what statute of limitations applies to this case cannot be the basis for excusing the petitioners' actions in bringing this lawsuit. Neither lower court rendered its decision based on a statute of limitations issue. The petitioners' actions were frivolous despite the statute of limitations issue. Furthermore, the petitioners' actions were frivolous because they continued to pursue their claims, even to this Court, after it became clear that they had no claim for relief against the respondents. Once the Fifth Circuit rendered its decision in the *Wamsley* case, which was contrary to petitioners' argument on ratification, they nevertheless continued their action. The petitioners pressed their case to this Court even after the district court and court of appeals found their actions frivolous, utterly baseless, and bizarre. 23 F.3d at 940.

Petitioners further attempt to justify their deliberate misquoting of counsel's time sheets by stating that they sought to uphold District Judge Harmon's courtroom procedures. The petitioners also offer excerpts from those procedures. *See* Petition at pp. 21-22. Respondents' counsel made five contacts with court personnel. Only three of the five contacts engaged in by respondents' counsel involved Judge Harmon's personnel; the other two contacts were with Magistrate Judge Stacy's law clerk and courtroom deputy.[3] The petitioners have not offered prohibitions from Judge Stacy's court against contact with her personnel, and petitioners' citations to contacts with Judge Stacy's courtroom personnel cannot be an attempt to uphold Judge Harmon's courtroom procedures.

Regarding the three contacts with Judge Harmon's personnel, all three involved telephone conversations with Judge Harmon's courtroom deputy regarding scheduling matters and a discovery conference. The first inquiry made by respondents' counsel with any court personnel was a March 17, 1993 letter with a copy sent to petitioners' counsel by certified mail. All questioned contacts occurred after putting Larry on notice of the contacts and subject matter of the contacts. Moreover, petitioners in their brief to the court of appeals stated that telephone conversations with the courtroom deputies regarding scheduling matters and discovery conferences was not improper. The court of appeals recognized that all contacts with court personnel were proper, and that the petitioners had admitted that contacts with courtroom deputies to Judge Harmon and Judge Stacy were proper. 23 F.3d at 938. Thus, there was no need for the petitioners to "uphold the written courtroom procedures" as stated in the petition. *See* Petition at p. 22.

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[3] Judge Harmon assigned certain pre-trial matters to Judge Stacy.

The petitioners have continued their pattern of frivolous and inappropriate actions in this Court in ways other than attacking Judge Smith and persisting in their arguments about the propriety of respondents' counsel's contacts with district court personnel. The petitioners filed a corrected petition with the Supreme Court clerk ten days after they filed their original petition. This correction was necessary to correct the impression that the district court had decided a statute of limitation issue. Thus, they included a page from the district court's order of summary judgment that was omitted from the original appendix B (appropriate if the omission actually was from negligence). However, the petitioners also used this opportunity to amend their questions presented to change the amount of sanctions imposed against them from $46,000.00 to $94,323.50. *See* Petitions at p. i. The petitioners were obligated to move for leave to amend when they made substantive changes in the questions presented, but did not do so. R. STERN, ET AL. SUPREME COURT PRACTICE § 6.27 (7TH ED. 1993). Therefore, the Court should not consider the amended questions presented in the corrected petition.

In addition, this conduct is consistent with other frivolous arguments in the petitioners' brief including:

- claiming that they had paid the sanctions imposed by the lower courts when they have not (Petition at pp. 2, 4);

- asserting that the respondents had engaged in race and age discrimination in violation of Title VII and the ADEA when those issues are irrelevant because there are no such claims in this lawsuit (Petition at pp. 3, 9, 11-12, 16);

- raising arguments regarding the OWBPA when there is no ADEA claim (Petition at p. 2, 12-13);

- claiming that they were discouraged from filing a petition for rehearing by Judge Smith when they were only warned against further "vexatious filing" including a "frivolous petition for rehearing or suggestions of rehearing *en banc*" (Petition at p. 2; 23 F.3d at 941);

- failing to reveal that the Houston petitioners worked in Houston, and stating that no petitioner received WARN written advance notice when all Bartlesville petitioners had received this notice (Petition at p. 3);

- declaring that the Fifth Circuit did not address the WARN statute of limitations in this case, "although the issue of first impression was raised" when it was not necessary for the court of appeals to address the issue because the statute of limitations was not relevant to the district court's decision (Petitioner at p. 8); and

- asserting that they had been sanctioned $94,323.50 when only $23,491.02 in sanctions are before this Court (Petition at p. 20).

It is obvious from the opinion of the court of appeals that petitioners had no justification for the scurrilous attacks on respondents' counsel, and by implication, the district court. The petitioners have continued that pattern of conduct here by raising the same issues as decided by the court of appeals,

personally attacking Judge Smith, and making frivolous arguments to the Court. Rather than granting the writ of certiorari as requested by petitioners, this Court should deny the petition, strike the scandalous matter regarding Judge Smith, and impose sanctions against the petitioners for their frivolous and misleading actions in the petition.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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# APPENDICES

23 FEDERAL REPORTER, 3d SERIES

Cynthia WILLIAMS, Lorenzo Harris, Shelly Hill, Hallie Cloud, Frelander Yarbrough, Jr., Donald Jackson, Clyde Warner, Dwjana Lawson, Jackie Martin, and Huey Cunningham, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants,

v.

PHILLIPS PETROLEUM COMPANY,
W. Wayne Allen, and C. J. Pete Silas,
Defendants-Appellees.

No. 93-2478.

United States Court of Appeals,
Fifth Circuit.

June 24, 1994

Laid off employees brought suit for employer's alleged violation of the Worker Adjustment and Retraining Notification Act (WARN) in allegedly failing to give statutorily required notice of layoff of covered employees. The United States District Court for the Southern District of Texas, Melinda Harmon, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) plants located in different states hundreds of miles apart could not be considered a "single site of employment" for purposes of WARN; (2) any obligation that employer had under WARN to give 60 days' advance notice of workers' discharge was satisfied when employer provided employees with fully paid

excused leave; and (3) releases executed by workers precluded them from bringing claims under WARN.

Appeal dismissed as frivolous.

1. Labor Relations - 7.1

Whether multiple work locations constitute a "single site of employment" layoffs at which may be aggregated for purposes of determining employer's notice obligations under the Worker Adjustment and Retraining Notification Act (WARN), is mixed question of fact and law, which Court of Appeals determines de novo. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

2. Labor Relations - 7.1

Plants which were located in different states, hundreds of miles apart, could not be considered a "single site of employment" under the Worker Adjustment and Retraining Notification Act (WARN), where employees were not rotated between plants and plants did not share staff or equipment; accordingly, layoffs at the two plants could not be aggregated for purposes of determining employer's obligation under WARN to give employees advance notice of their layoff. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

See publication Words and Phrases for other judicial constructions and definitions.

3. Labor Relations - 7.1

Mass layoff at one employment site which is sufficient to trigger employer's notice obligations under the Worker Adjustment and Retraining Notification Act (WARN) would not necessarily give rise to a duty to warn employees at other plants who are bumped as a result of laid off workers' relocation, unless sufficient number of workers are bumped at second site to trigger WARN independently. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

4. Labor Relations - 7.1

Any duty that employee had under the Worker Adjustment and Retraining Notification Act (WARN) to provide workers with 60 days' advance notice of their layoff was satisfied where employer provided workers with fully paid excused leave during all or part of this 60-day notice period. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

5. Release - 6, 15, 38

Releases signed by workers in connection with their layoffs, pursuant to which workers, in return for payment of additional benefits, agreed to release employer from all claims relating to time of their employment or their layoffs, were valid and enforceable and precluded workers from bringing any claims for employer's alleged failure to give proper notice of their layoffs under the Worker Adjustment and Retraining Notification Act (WARN); releases were written in clear, simple and easily understood English, workers had 45 days to consider releases prior to signing them, and workers were specifically advised, by language in releases, that they should

seek legal advice. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

6. Federal Courts - 412.1

Normally, release of federal claims is governed by federal law.

7. Release - 2

Public policy favors voluntary settlement of claims and enforcement of releases.

8. Release - 15

Release of employment or employment discrimination claim is valid only if it is knowing and voluntary.

9. Release - 55

Once party establishes that his opponent has signed release that addresses claims at issue, received adequate consideration and breached release, opponent has burden of demonstrating that release was invalid because of fraud, duress, material mistake, or some other defense.

10. Release - 52

Court of Appeals examines totality of circumstances to determine whether releasor has established appropriate defense to claims for its alleged breach of release.

11. Release - 15

Releases signed by laid off workers in connection with their layoffs did not have to specifically advise them of rights which they were relinquishing under the Worker Adjustment and Retraining Notification Act (WARN), in order for releases to be enforceable and to preclude employees who executed releases from bringing claim under WARN for employer's alleged failure to give statutorily required notice of their layoffs. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§ 2101-2109.

12. Release - 55

Burden was on laid off workers asserting claims under the Worker Adjustment and Retraining Notification Act (WARN) to show that releases executed by workers in connection with their layoffs were not enforceable, by producing some evidence of fraud, duress or other facts bearing on validity of releases.

13. Release - 21

Even assuming that laid off workers did not knowingly and voluntarily sign documents purporting to relieve their employer of any claims under the Worker Adjustment and Retraining Notification Act (WARN), they ratified releases, and were precluded from bringing claim under WARN by failing to return consideration which they received in connection with their execution of releases.

14. Release - 21

Even if release is tainted by misrepresentation or duress, it is ratified if releasor retains consideration after learning that release is voidable.

15. Release - 38

Person who signs release, then sues his or her employer for matters covered under release, is obligated to return consideration.

16. Federal Civil Procedure - 2553

Denial of plaintiffs' motion for continuance to conduct additional discovery to support their opposition to defendants' motion for summary judgment was not abuse of discretion, where only issues presented by defendants' motion were pure issues of law, and no factual issues existed which would have required additional discovery. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

17. Federal Civil Procedure - 241

District court properly denied plaintiffs' motion to join new parties, where plaintiffs identified no specific parties that needed to be added by the time that trial court ruled on defendant's motion for summary judgment.

18. Federal Civil Procedure - 2840

Attorney fees of $20,000 were properly awarded against plaintiffs for their pursuit of frivolous appeal from district court's grant of summary judgment in favor of defendants on plaintiffs' claims under the Worker Adjustment and Retraining Notification Act (WARN), based on conduct of plaintiff's attorney in deliberately attempting to mislead Court of Appeals and to put veneer of impropriety on innocent acts of defendants by quoting selectively from defendant's time sheets and even mischaracterizing parties involved. F.R.A.P. Rule 38, 28 U.S.C.A.

19. Federal Civil Procedure - 2839

Costs and attorney fees are warranted for frivolous appeal, the result of which is obvious from comprehensive and decisive exposition of law by judge below. F.R.A.P. Rule 38, 28 U.S.C.A.

20. Federal Civil Procedure - 2847

Attorney fees imposed as sanction for party's frivolous appeal need not be fully compensable.

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Julius J. Larry, III, Houston, TX, for appellant.

Kerry E. Notestine, Robert J. Fries, Sr. Atty., Bracewell & Patterson, Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before SMITH and BARKSDALE, Circuit Judges, and WALTER,* District Judge.

JERRY E. SMITH, Circuit Judge:

Plaintiffs appeal a summary judgment in favor of defendants on claims under the Worker Adjustment and Retraining Notification Act ("WARN"). Finding no error, we dismiss the appeal. Concluding that the appeal is frivolous and that plaintiffs' counsel's attacks on opposing counsel and

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* District Judge of the Western District of Louisiana, sitting by designation.

the district court are baseless and scurrilous, we award attorneys' fees and double costs under Fed.R.App.P. 38.

I.

A.

In 1992, Phillips Petroleum Company, Phillips Gas Holding Company, Inc. ("PGHC"), and Phillips 66 Company, a division of Phillips Petroleum Company, reduced their work forces at their Houston Chemical Complex ("HCC"). Phillips Petroleum Company laid off over 500 employees in Bartlesville, Oklahoma, and provided them with sixty days' advance written notice. The company laid off many of those employees in May 1992, including Clyde Warner, Dwjana Lawson, Jackie Martin, and Huey Cunningham (the "Bartlesville plaintiffs").

HCC laid off twenty-seven employees who worked at three different locations in the Houston area and did not give any of them sixty-day written notices. HCC laid off five employees in December 1991, sixteen employees from March to July 1992, and six employees in September 1992. From March through June 1992, PGHC laid off forty employees who worked in three different single sites of employment. Thirty-one employees worked in Bartlesville, Oklahoma, eight in Houston, and one in Washington, D.C.

PGHC gave all the employees who worked in Bartlesville and four employees who worked in Houston sixty days' written notice of the layoff. The remaining laid-off PGHC employees did not receive sixty days' notice.

Five of the plaintiffs (collectively "Williams" or the "original plaintiffs") worked for HCC, which laid off Cynthia Williams and Shelly Hill in March 1992 and Hallie Cloud,

Frelander Yarbrough, Jr., and Donald Jackson in September 1992; the other named plaintiff, Lorenzo Harris, worked for PGHC in Houston. PGHC laid off Harris in March 1992. The defendants did not provide sixty-days' written notice to any of the original plaintiffs. No original plaintiff worked in Bartlesville, although the Bartlesville plaintiffs all worked in Bartlesville.

Phillips Petroleum Company laid off the Bartlesville plaintiffs in March 1992 and provided sixty-day written notices. The original and Bartlesville plaintiffs all signed releases after their terminations in exchange for enhanced layoff benefits.

B.

The original plaintiffs brought this action for alleged violations of WARN, 29 U.S.C. §§ 2101-2109, alleging that Phillips Petroleum Company and two of its officers, W. W. Allen, and C. J. Silas (collectively "Phillips"),[1] laid them off without providing the sixty-day written notice required by WARN.

On January 25, 1993, defendants requested summary judgment on the grounds that WARN was not implicated because the layoffs were not from a single site and that even if the single-site requirement was met, the plaintiffs had

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[1] Because we dismiss all defendants for failure to state a valid WARN claim, we need not address the issue of whether WARN permits liability to be imposed on individual defendants such as Allen and Silas. We note that individuals are excluded by WARN's plain terms, as WARN covers only an "employer," defined as a "business enterprise" that employs "100 or more employees." 29 U.S.C. § 2101; *Wallace v. Detroit Coke Corp.*, 818 F.Supp. 192, 194 (E.D. Mich. 1993). Construing a similar definition of "employer" in title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), we recently held that a natural person who does not otherwise qualify as an "employer" cannot be held liable for backpay. *See Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994).

signed written releases of their claims against Phillips. Plaintiffs filed a cross-motion for summary judgment, asking that the written releases be declared invalid.

On April 26, 1993, the original plaintiffs moved to join unnamed new parties to the lawsuit, stating that the new parties would be individuals who had been laid off from Phillips's operations in Bartlesville. The district court denied the motion.

The district court granted summary judgment to Phillips in an order and separate judgment entered on June 8, 1993. In that order, the district court identified several outstanding motions from both parties, rendered summary judgment for Phillips on all issues, and declared all other motions pending at that time to be moot.

On June 14, 1993, the plaintiffs attempted to have the Bartlesville plaintiffs join this action. In an order of July 26, 1993, the court denied all motions filed after the entry of final judgment. The court reserved ruling in its July 26 order on the defendants' bill of costs, which included a request for attorneys' fees, and has not ruled on the defendants' bill of costs at this time.

II.

Plaintiffs stated in their notice of appeal that they were appealing "the final judgment entered in this action on the 8th day of June, 1993." In its June 8 order, the court rendered summary judgment on the original plaintiffs' claims against the defendants, denied the original plaintiffs' motion for summary judgment, and held that all other pending motions were moot. The court issued another order dated July 26, denying all motions filed after the June 8 order, including the original plaintiffs' attempt to join the Bartlesville plaintiffs.

Because the plaintiffs appealed only the June 8 order, the only issues the plaintiffs perfected for appeal are the decisions made in that order. The motion to join the Bartlesville plaintiffs has not been preserved for appeal.

III.

A.

[1] The district court rendered summary judgment because no mass layoff occurred at the single sites of employment where the original plaintiffs worked. Whether multiple work locations constitute a "single site of employment" under WARN is a mixed question of fact and law. *Carpenters District Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1289 (5th Cir. 1994). Reviewing *de novo* the issue of whether the Houston and Bartlesville employment locations constitute a "single site of employment", we agree with the district court and hold that the Houston and Bartlesville locations were not a single site of employment.

WARN requires covered employers to provide "affected employees" notice of a mass layoff. "Affected employees" include "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5). A "mass layoff" is defined as any employment loss at a single site of employment that involves one-third of the employees at that site and at least fifty employees, or at least 500 employees. 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c). If a "mass layoff" occurs, the employer must provide written notice to each affected employee at least sixty days prior to the layoff and inform various state and local officials of the mass layoff. 29 U.S.C. § 2102. An employer who violates WARN is liable for back

pay, lost benefits, civil penalties, and attorneys' fees. 29 U.S.C. § 2104.

1.

[2] The statute does not define a "single site of employment." The rules promulgated by the Secretary of Labor provide that "[n]on-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site." 20 C.F.R. § 639.3(i)(4). Groups of structures within a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment. Two plants on opposite sides of a town do not constitute a single site of employment if they employ different workers. *See* 20 C.F.R. § 639.3(i)(1), (4).

The Houston and Bartlesville layoffs cannot be aggregated to bootstrap the Houston plaintiffs over the WARN minimum required for a mass layoff. The regulations indicate that two plants across town will rarely be considered a single site for purposes of a mass layoff. It is not plausible, under any reasonable or good-faith reading of the regulations, that the Houston and Bartlesville plants -- located in different states and hundreds of miles apart -- could be considered a "single site" for purposes of WARN.

Employees were not rotated between the different sites, and the locations did not share staff and equipment. *See* 20 C.F.R. § 639.3(i)(3). No other "unusual circumstances" have been alleged that would support classifying the two plants as a "single site." *See* 20 C.F.R. § 639.3(i)(8). *Carpenters*, 15 F.3d at 1290. As the Bartlesville and Houston sites are distinct, they may not be aggregated in order to meet the minimum employee requirements of WARN. 20 C.F.R. § 639.3(i)(1); *International Union, United Mine Workers v.*

*Jim Walter Resources, Inc.*, 6 F.3d 722, 724-27 (11th Cir. 1993). The Bartlesville layoffs, accordingly, are irrelevant to the issue of whether the Houston employees were entitled to notice under WARN.

No mass layoff occurred at the single sites of employment where the original plaintiffs worked. Five of the plaintiffs worked at HCC's operations in three different locations in and around Houston. HCC laid off twenty-seven employees over a ten-month period. One of the named plaintiffs worked for PGHC in Houston; PGHC laid off eight employees who worked at that site. The layoffs at HCC and PGHC were not mass layoffs as defined by the Act, as the number of employees laid off did not meet the fifty-employee minimum. Thus, the Houston employees were not entitled to WARN notification.

2.

[3] Williams contends that the mass layoff in Bartlesville triggered the applicability of WARN, requiring that notice be given to those laid off in Houston. *See* Department of Labor Comments, 54 Fed. Reg. 16042, 16046 (1989). Even if we assume that these comments have legal effect, they apply only if the employees at the single site suffering the mass layoff are relocated to other sites, thereby "bumping" employees at those sites. Moreover, those likely to be bumped must be individually and reasonably identifiable at least sixty-five days before the bumping occurs. *Id.*

A WARN event at the first site will trigger a WARN event at the second site only if a sufficient number of workers are bumped at the second site to trigger WARN independently. Plaintiffs have not alleged that any bumping occurred and have ignored the plain language of the department's comment limiting it to bumping situations.

[4] Over 500 employees were laid off in Bartlesville. Williams contends that Phillips's notice to those employees was defective. This claim fails for two reasons First, the claims of the Bartlesville plaintiffs are not properly before us, as they failed to perfect their appeal. Second, even if we had jurisdiction, Phillips's alleged acts did not violate WARN.

There is no dispute in the record that Phillips provided sixty-day written notices to all employees laid off in Bartlesville. For some of the employees laid off, Phillips continued to pay their base pay and benefits during all or part of the sixty-day notice period but placed them on "excused leave with pay." The employees were not terminated at this time. The notices submitted by Phillips stated that the layoff date was at least sixty days after the notice date. There is no evidence to support the assertion that Phillips immediately terminated the individuals laid off in Bartlesville.

Moreover, the premise of Williams's argument is of questionable validity. Excused leave with pay and benefits, with no corresponding duty to work, cannot harm an employee. WARN was intended to provide employees with notice so that they could adjust to the layoff and locate other work. Fully paid excused leave complies with these purposes.

B.

[5] The district court also rendered summary judgment for Phillips because the plaintiffs had signed releases covering the allegations made in their complaint. The plaintiffs filed a cross-motion for summary judgment contesting the validity of the releases. The district court

properly granted Phillips's motion, thereby rejecting plaintiffs'.[2]

[6-10] Normally the release of federal claims is governed by federal law. *See, e.g., O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990) (Age Discrimination in Employment Act ("ADEA")); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (title VII of the Civil Rights Act of 1964). Public policy favors voluntary settlement of claims and enforcement of releases, *Rogers*, 781 F.2d at 454, but a release of an employment or employment discrimination claim is valid only if it is "knowing" and "voluntary," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n. 15, 94 S.Ct. 1011, 1022 n. 15, 39 L.Ed.2d 147 (1974). Once a party establishes that his opponent signed a release that addresses the claims at issue, received adequate consideration, and breached the release, the opponent has the burden of demonstrating that the release was invalid because of fraud, duress, material mistake, or some other defense. We examine the totality of circumstances to determine whether the releasor has established an appropriate defense. *O'Hara*, 898 F.2d at 1017.

1.

Each original plaintiff signed a release shortly after his or her termination of employment. The releases stated that signing the release was a condition to participation in the company's enhanced supplemental layoff pay plan, advised the employee to consult an attorney, gave ample time to consider the release, and specifically covered all claims

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[2] Although this discussion is unnecessary to the issue of whether WARN was violated, given our holding in part III.A., *supra*, we include it as a further indication that this action is frivolous.

relating to the individual's employment or layoff. The Bartlesville plaintiffs signed similar releases.

The requirements of WARN pertain to an individual's employment and termination, issues addressed in the releases. Phillips provided enhanced benefits for those employees who signed the releases. These benefits were in addition to the basic severance plan benefits that the employees would have received regardless of whether they had signed the releases. The original plaintiffs are making claims on matters addressed in their release, and the Bartlesville plaintiffs attempted to join the lawsuit that involved claims on matters addressed in their release. Thus, all elements of a valid release are present.

Williams has provided no credible evidence that the releases were obtained by fraud or duress. There is no genuine issue of material fact that the releases were valid.

[11] Williams contends that the releases were invalid because they did not mention WARN. This argument is meritless. There is no obligation under WARN or the common law for the defendants to mention WARN for the releases to be valid. The releases stated that they included all claims relating to the "time of my employment or to my layoff . . . ." WARN applies to layoffs and the releases addressed all claims related to the plaintiffs' layoffs; thus, the releases barred WARN claims. *See Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1117 (7th Cir. 1990) (holding that a release of claims relating to employment barred claim under Employee Retirement and Income Security Act of 1974 ("ERISA")); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 461 (9th Cir. 1989), *cert, denied*, 498 U.S. 854, 111 S.Ct. 151, 112 L.Ed.2d 117 (1990); *Franz v. Iolab, Inc.*, 801 F.Supp. 1537, 1543 (E.D. La. 1992) (holding that a release of all claims barred wrongful discharge and ERISA claims).

Plaintiffs also argue that the waivers did not comply with the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f). Plaintiffs have asserted no age discrimination claim, and their proffered analogy between WARN and the ADEA does not survive scrutiny. The OWBPA places specific requirements on waivers of age discrimination claims in order for them to be considered knowing and voluntary. This statute is a change from the common law, and there is no similar obligation imposed on employers under WARN.

[12] Williams contends that the waivers are invalid under a totality of the circumstances test. She claims that the combination of five factors makes the waivers invalid, but she identifies no precedent suggesting that these factors are dispositive. Williams carried the burden to demonstrate that there was a genuine issue of material fact on a defense to the validity of the releases. She was obligated to produce some evidence of fraud, duress, or other basis for holding the release invalid. *See Widener v. Arco Oil & Gas Co.*, 717 F.Supp. 1211, 1215 (N.D. Tex. 1989). She has not done so, thus summary judgment was appropriate.

Even if we accept Williams's statement of the totality of circumstances test, she cannot prevail. She identifies several elements to consider: (1) a plaintiff's education and business experience; (2) the role of each plaintiff and class member in deciding the terms of the release; (3) the clarity of the agreement and all related documents referred to in the releases; (4) whether each plaintiff and class member was represented by or consulted with an attorney; and (5) the amount of time each plaintiff and class member had possession of or access to the release before signing it.

Concerning the plaintiffs' education and business experience, there no evidence suggesting that they could not

read or understand the releases. The cases relied upon by the plaintiffs are distinguishable by whether the individual who signed the release understood the claims released. There is nothing in the record establishing a genuine issue of material fact that the plaintiffs did not know what they were doing.

Plaintiffs argue that none of them negotiated the terms of the releases. There is no evidence that plaintiffs were denied an opportunity to negotiate, nor that they were given a "take it or leave it" offer. The releases informed each employee that he should consult a lawyer and allowed a reasonable period, in most instances up to forty-five days, to consider the releases. The plaintiffs signed the releases and never asserted in their declarations that Phillips had precluded them from negotiating. There is no evidence sufficient to create a genuine issue of material fact.

The releases were clear, simple, and easily understood. The release precluded all claims related to the plaintiffs' "employment" or "layoff." This is not technical jargon, and it covers the plaintiffs' WARN claims. The plaintiffs do not indicate what provisions could have been incomprehensible to them, as they were written in plain English. There is also no evidence of duress that could have forced them to sign involuntarily.

The plaintiffs also claim that the releases should be invalidated because the defendants presented no evidence that each plaintiff and class member actually consulted with an attorney. The releases signed by the plaintiffs stated:

> You should thoroughly review and understand the effect of the release before signing it. To the extent that you have any claims covered by this release, you will be waiving potentially valuable rights by signing.

> You are also advised to discuss this release with your lawyer.

Thus, defendants advised the plaintiffs to consult a lawyer. Plaintiffs suggest that Phillips should have offered to supply a lawyer, but they offer no authority imposing this duty. Even without signing the releases, plaintiffs were entitled to substantial layoff benefits that could have been used to finance a lawyer, either individually or jointly. It is not Phillips's fault that the plaintiffs chose not to consult a lawyer after being advised to do so. Plaintiffs do not contest the final element of the test, as they were given as much as forty-five days to consider the releases.

2.

[13-15] Even if a release is tainted by misrepresentation or duress, it is ratified if the releasor retains the consideration after learning that the release is voidable. A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration. Offering to tender back the consideration after obtaining relief in the lawsuit would be insufficient to avoid a finding of ratification. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220-21 (5th Cir. 1991).

For signing the releases, the original plaintiffs as a group received $210,853.65 in consideration in an enhanced plan benefits and $56,632.38 in basic plan benefits. The original plaintiffs did not return the consideration to the defendants, even after making claims that the releases were voidable. Thus, the plaintiffs ratified the releases even if, *arguendo*, they were not knowingly and voluntarily signed. *Grillet*, 927 F.2d at 220.

IV.

[16] Plaintiffs argue that the district court abused its discretion by not giving them time to conduct discovery and prepare affidavits to support their opposition to the defendants' motion for summary judgment. Plaintiffs complain that the court did not rule on their motion for continuance. This is incorrect. The court noted that the motion for continuance was outstanding and determined that all pending motions other than the defendants' summary judgment motion were moot. As a result, the court denied the continuance.

Summary judgment was awarded because plaintiffs did not work at single sites of employment and had released their claims. These were pure issues of law. There are no issues of fact that would require additional discovery. Thus the court did not err by refusing to grant a continuance.

Plaintiffs also complain that Phillips did not answer discovery based upon the events in Bartlesville. Because all the plaintiffs worked in Houston, however, events in Bartlesville were irrelevant to their case. Thus, no further discovery was necessary.

Plaintiffs have asserted a number of other discovery requests. But they have not explained how these discovery matters are relevant to any issue in the case. Moreover, to the extent these discovery materials may be relevant, plaintiffs have not indicated what information they seek that would be sufficient to create a genuine issue of material fact. Denial of these requests was appropriate.

[17] Plaintiffs also assert that the district court abused its discretion by denying their motion to join new parties. The plaintiffs made this motion before the district

court rendered summary judgment but did not identify the parties they sought to add until after judgment was entered. The court acted properly in denying the motion, as plaintiffs identified no specific parties that needed to be added by the time the court ruled on the motion. There was no basis for the district court to grant the motion without having specific parties to add.

V.

Plaintiffs' attorney, Julius J. Larry, III, contends that Phillips's outside attorney, Kerry E. Notestine, engaged in improper *ex parte* communications with the district judge, the magistrate judge, and their law clerks. The record is singularly devoid of evidence that the contacts were improper. Moreover, these same accusations were briefed and rejected in the district court. Lacking any evidence that the contacts were improper, the accusations of plaintiffs' counsel are scurrilous, frivolous, and contrary to the duties of an officer of the court. Larry's legal arguments are also frivolous and independently deserving of sanctions.

A.

[18] Larry seeks to mislead this court about the circumstances of the alleged improper contacts. He attempts to prove his conclusion of unethical conduct by Phillips's counsel by seriously misquoting defendants' counsel's time records, omitting important facts from the description of counsel's activities, and drawing unsupported conclusions. The defendants responded to these accusations in the district court. Serenely undeterred by his lack of success, Larry has renewed his personal attack against defendants' counsel in this court.

This issue arose from defendants' submission of a bill of costs in the district court. In their bill of costs, the defendants moved for attorneys' fees because the district court specifically found the plaintiffs' lawsuit was frivolous. The defendants attached billing records summarizing the activities performed by their counsel on the case. In their appeal brief, plaintiffs have excerpted sections identifying five contacts between Notestine and the case managers to Judges Harmon and Stacy relating to scheduling matters and a discovery conference. The plaintiffs admit, as they must, that counsel may communicate with these individuals. Notestine also had one telephone conversation with Vivian Craft, Judge Stacy's law clerk, but that conversation was initiated by Craft and was for a legitimate purpose.

Reviewing each of the allegedly improper contacts, Larry's duplicity in imputing unethical conduct to Notestine becomes apparent. For instance, in his brief on appeal, Larry reproduces the first contact as follows:

| | | |
|---|---|---|
| 4/14/93 | 1.80 (Hours) | Telephone conference with clerk to Judge Harmon. |

---

The record indicated that this excerpt should read:

| | | |
|---|---|---|
| 4/14/93 | 1.80 (Hours) | Telephone conference with clerk to Judge Harmon re: status; telephone conference with Rob Fries re: same; preparation of discovery response to sent to other side; review of reply to defendants response to plaintiffs motion for leave to supplement their |

| | | |
|---|---|---|
| | | complaint; transmitting same to client. |

---

Comparing Larry's excerpts with the accurate report, Larry plainly intended to mislead this court into believing that Notestine spoke with for almost two hours with Judge Harmon's law clerk. The context of the full billing report, however, indicates that the phone conversation occupied only a small portion of the time. Moreover, because this entire issue was already briefed in the district court, Larry knew that Notestine's communication was actually with Judge Harmon's case manager, not any law clerk. Larry admits that contacts with a case manager are permissible. Despite recognizing that the time sheet should read "case manager" rather than "law clerk," he doggedly and irrelevantly continues to argue that law clerks should not communicate with parties.

Larry reproduces the second contact as follows:

| | | |
|---|---|---|
| 5/5/93 | .20 (Hours) | Telephone conference with clerk to Judge Stacy. |

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In full, the time sheet actually reads:

| | | |
|---|---|---|
| 5/5/93 | .20 (Hours) | Telephone conference with clerk to Judge Stacy re: hearing requested. |

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Again, Larry is aware that this contact was actually with Judge Stacy's case manager, not her law clerk. The substance

of the conversation dealt with Judge Stacy's impending maternity leave and whether the parties would be able to have a discovery and motion conference before she went on leave.

The third contact is identified by Larry as follows:

| | | |
|---|---|---|
| 5/14/93 | .40 (Hours) | Telephone conference with Vivian Craft, law clerk to Judge Stacy. |

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The full text of the time sheet reads:

| | | |
|---|---|---|
| 5/14/93 | .40 (Hours) | Telephone conference with Rob Fries re: status; telephone conference with Vivian Craft, law clerk to Judge Stacy, re: discovery conference. |

---

Vivian Craft was Judge Stacy's law clerk. But this contact was initiated by her, not by Notestine, and the time records indicate that the conversation related only to the discovery conference.

According to Larry, as set forth in his appellate brief, the fourth communication reads:

| | | |
|---|---|---|
| 5/19/93 | .60 (Hours) | Telephone conference with clerk to Judge Harmon re: resolution on motions. |

---

Again, reality differs dramatically from Larry's brief:

| | | |
|---|---|---|
| 5/19/93 | .60 (Hours) | Telephone conference with clerk to Judge Harmon re: resolution of motions; telephone conference with Rob Fries re: same. |

---

Again, "clerk to Judge Harmon" refers to her case manager, not her law clerk, and there is nothing improper about contacting a case manager for this purpose.

Larry's characterization of the fifth contact is probably the most egregious misstatement of all:

| | | |
|---|---|---|
| 4/28/93 | 1.30 (Hours) | Telephone conference with Judge Harmon. |

---

In reality, the record reads as follows:

| | | |
|---|---|---|
| 4/28/93 | 1.30 (Hours) | Telephone conference with Rob Fries re: rule 26(f) conference; research re: same; review of motion to add parties; transmitting same to client; telephone conference to Judge Harmon re: same telephone conference with Rob Fries re: same. |

---

Larry obviously hopes to mislead this court in a number of ways with his characterization of this time records. First, he implies that Notestine spoke directly with Judge Harmon for 1.3 hours. Defendants never spoke to Judge Harmon about the case and never attempted to do so, much less for a full 1.3 hours. As Phillips's counsel explained long ago, the reference to a "telephone conference to Judge Harmon" was an abbreviated reference or typographical error relating to a conversation with Judge Harmon's case manager, not the judge herself, about a rule 26(f) conference.

In advancing his claim, Larry has attempted to mislead the court by blatantly misrepresenting the record. Trying to sell this court on his conspiracy theories, he has attempted to put a veneer of impropriety on innocent contacts by quoting selectively from Notestine's time sheets and even mischaracterizing the parties involved. We will not stand by idly and allow an attorney to waste the time of this court and maliciously denigrate the reputations of judges and other officers of the court.

Moreover, Larry has not explained, either in his brief or in his ample opportunity at oral argument, why he has raised this issue at all. He has asked for no remedy, such as overturning the judgment. His only discernible motive is to cast brickbats and to "poison the well" by tattling on his opponent. Such motives hardly justify his baseless allegations and his attempt to lie to this court regarding what is in the record.

Upon determination that an appeal is frivolous, we "may award just damages and single or double costs to the appellee." Fed. R. App. P. 38. Larry has attempted to mislead this court for no legitimate end. He has wasted the time and energy of opposing counsel and of this court. As a

result, we exercise our power to impose sanctions on plaintiffs and their counsel for filing a frivolous appeal.

B.

Importantly, the plaintiffs' assertions, made through Larry, are not based upon any reasonable or good-faith reading of applicable law. They are utterly baseless and bizarre. The district court explained this in its comprehensive order granting summary judgment. At that point, any attorney should have advised his clients of the loss and urged them to pursue the matter no further.

Seven pages of Phillips's fifty-page brief were required to rebut Larry's misguided charges of misbehavior. The plaintiffs' challenge to the validity of the waivers rests on a frivolous theory equating WARN with the OWBPA. Larry forced Phillips to defend against the claims of the Bartlesville plaintiffs, who were not even properly parties to this appeal. His argument for the applicability of WARN rests no comments by the Labor Department applicable only to employees bumped from their jobs by senior employees, a situation that is not alleged to apply here. Finally, although we have not reached the merits of the issue, his attempt to impose individual liability upon Silas and Allen lacks any colorable foundation in the language or structure of WARN.

C.

[19] "[C]osts and attorneys' fees [under rule 38] are merited for a frivolous appeal the result of which is obvious from the comprehensive and decisive exposition of the law by the judge below." *Coghlan v. Starkey*, 852 F.2d 806, 810 (5th Cir. 1988) (per curiam) (footnote omitted). In response to inquiry by the court, defendants' counsel documents $32,765.50 for attorneys' fees and $3,039.22 in costs

associated with responding to plaintiffs' appeal. Other than charges for in-house legal fees, these are fees actually billed to defendants by outside counsel.

[20] The plaintiffs have not disputed the reasonableness of these fees. We have held that fees imposed as a sanction need not be fully compensable. *See Atwood v. Union Carbide Corp.*, 850 F.2d 1093, 1094 (5th Cir. 1988) (per curiam). We need not decide whether the fees claimed here are justified, for we conclude that fees of $20,000 are supportable and will serve adequately as a sanction. For this reason, we also need not decide whether the in-house legal fees of $5,607.00, included in the amount claimed, may be recovered.

D.

Given the generally frivolous nature of the appeal, exacerbated by Larry's scurrilous attacks on Phillips's counsel and the district court, pursuant to rule 38 we order the original plaintiffs, Larry, and Justice Center-Houston, which is of counsel on appeal, to pay Phillips's attorneys' fees of $20,000.00 and attorneys' costs of $3,039.22, plus double taxable costs on appeal. We also warn plaintiffs that further vexatious filings in this case, including any frivolous petition for rehearing or suggestion of rehearing *en banc*, will subject the plaintiffs and their counsel to further sanctions and/or discipline.

The appeal is DISMISSED as frivolous. *See* 5th Cir. R. 42.2.

APPENDIX 2 - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CYNTHIA WILLIAMS, ET AL., Plaintiffs, | § | |
| v. | § | |
| | § | C.A. NO. H-92-3909 |
| PHILLIPS PETROLEUM COMPANY, ET AL | § | |
| Defendants | § | |

FINAL SUMMARY JUDGMENT

Pursuant to the order signed on this day, the Court

ORDERS that final summary judgment is GRANTED in favor of Defendants, Phillips Petroleum Company, W. Wayne Allen, and C.J. Silas against Plaintiffs Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, and Frelander Yarbrough, Jr. All costs are taxed against Plaintiffs.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this *4th* day of June, 1993.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX 2 - 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CYNTHIA WILLIAMS, | § | |
| ET AL., | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | |
| | § | C.A. NO. H-92-3909 |
| PHILLIPS PETROLEUM | § | |
| COMPANY, ET AL | § | |
| | § | |
| Defendants | § | |

ORDER OF SUMMARY JUDGMENT

Pending before the Court in the above referenced action for declaratory judgment and damages under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109, for failure to provide employees with a sixty-day notification prior to termination because of a mass layoff, and seeking class certification are the following motions:

(1) Defendants Phillips Petroleum Company, W. Wayne Allen, and C.J. Silas's motion for summary judgment (instrument #4) and amended motion for summary judgment (#13) for failure to state a claim, under Fed. R. Civ. P. 12(b) and 56;

(2) Plaintiffs Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, and Frelander Yarbrough, Jr.'s motion for continuance to conduct discovery to answer the above motion (#8);

(3) Plaintiffs' cross-motion for summary judgment (#14);

(4) Plaintiffs' motion to strike Defendants' amended n[m]otion for summary judgment and Rule 11 sanctions (#15);

(5) Defendants' motion for leave to amend Defendants' motion for summary judgment, if necessary (#17);

(6) Defendants' motion for sanctions (#21);

(7) Plaintiffs motion for leave to supplement original complaint after discovery (#23);

(8) Plaintiffs' motion to strike the amended affidavit of J.D. Fultz (#24);

(9) Plaintiffs' motion to join new parties (#33);

(10) Defendants' request for referral to a magistrate judge, motion for discovery and motion conference and n[m]otion for stay of discovery pending ruling on motions (#34); and

(11) Plaintiffs' motion to compel (#36).

While Plaintiffs claim that they filed a motion for interlocutory default, there is none in the file or listed on the docket sheet. However, because it is a frivolous challenge in light of Defendants' timely appearance in the form of a motion for summary judgment, the Court considers the matter moot.

Defendants' motion for summary judgment argue that as a matter of law they could not have violated WARN. They explain that under specific circumstances WARN requires "covered employers" to provide employees with a sixty-day notice of termination because of a "mass layoff." A mass layoff is defined as either an employment loss involving at lest one-third of the employees and at least fifty employees at a single site of employment, or 500 employees. Defendants contend that they did not lay off fifty or more employees at one site and that Plaintiffs cannot aggregate employees working at "[n]on-contiguous sites in the same geographic area which do not share the same staff or operational purpose." 20 C.F.R. § 639.3(i). While groups of structures on a campus or in an industrial park or separate facilities divided by a street may constitute a single site of employment, two plans on opposite sides of town that employ different workers do not. 20 C.F.R. § 639.3(i)(1) & (4); United Mine Workers v. Harman Mining Corp., 780 F. Supp. 375 (W.D. W.Va. 1991). Furthermore layoffs must occur within ninety days of each other, not the case here, for purposes of aggregation. 29 U.S.C. § 2102(d). Five of the named Plaintiffs worked at the Houston Chemical Complex ("HCC") in Pasadena, where twenty-seven employees were laid off over a ten-month period between December 1991 and September 1992. One worked at Phillips Gas Holding Company, Inc. ("PGHC"), where eight employees were laid off.[1] Neither instance constituted a mass layoff and therefore there was no notice obligation under WARN. Even if the HCC and PGHC (and Clear Lake) terminated employees were

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[1] J.D. Fultz's amended affidavit reduces this manner of employees terminated at the Pasadena HCC and reassigns them to Phillips' Clear Lake facility. In any case, there is no effect on Defendants' contention that as a matter of lawsuit could not have violated WARN.

Defendants state that PGHC laid off thirty-one employees in Bartlesville, Oklahoma and one in Washington, D.C., but these are distinctly separate sites of employment from those around Houston.

aggregated, an improper procedure here, the total would be less than the minimum fifty employees required to trigger WARN. They submit a supporting affidavit from J.D. Fultz, Manager of Employee Relations at Phillips Petroleum Company, which was subsequently amended to show that four employees previously identified with the Pasadena HCC site were actually at other Phillips sites. (The amendment attached to one of Defendants' responses, #20.) See footnote 1.

Defendants also content that any class allegations should be dismissed because none of the named Plaintiffs is an adequate class representative with viable class claims. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977)

Moreover Defendants point out that a "covered employer" under WARN is any "business enterprise" that employs 100 or more employees. 29 U.S.C. § 2101. Individual Defendants Allen and Silas are not business enterprises and do not employ personally 100 or more employees. WARN does not expressly provide for liability of agents of covered employers, and therefore these two individuals should be dismissed.

Secondly Defendants are entitled to summary judgment because following their terminations, all named Plaintiffs signed releases of their claims in exchange for enhanced benefits. Defendants provide copies of these instruments, which release all claims that "relate either to the time of my employment or to the termination of my employment" and expressly include the "Company's right to layoff its employees at will . . . ."

Third, because WARN lacks a statute of limitations, the Court should utilize federal statute of limitations if it is more

analogous than state statutes and if federal policies behind a statute are frustrated by the state statutes. Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson, 111 S. Ct. 1773, 2777-79 (1991) (narrow exception to general rule that in the absence of an express federal statute of limitations, court should borrow analogous state statute). Defendant urge that for this labor dispute it is appropriate to borrow the six-month limitations period under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b). Newspaper and Mail Deliverers' Union v. United Magazine Company, 809 F. Supp. 185 (E.D.N.Y. 1992) (NLRA's six-month limitations period applies to WARN action). Defendants argue that the claims of three Plaintiffs, i.e., Williams, Hill and Harris, are time-barred. Williams and Hill were terminated on March 26, 1992, while Harris was terminated on March 4, 1992; suit was not filed until December 30, 1992. Because the Court finds that Plaintiffs failed to state a claim under WARN, it does not reach this issue.

Plaintiffs have filed every kind of conclusory and frivolous objection and allegation conceivable and have moved for additional time to do discovery. However, the issues here are a matter of law. Because the Court concludes that Defendants have shown that plaintiffs have not and cannot state a viable cause of action under WARN and because they have released their claims on this matter, the Court will not countenance wasting additional time and energy of all involved. Accordingly, the Court

ORDERS that summary judgment is GRANTED in favor of Defendants against Plaintiffs. All other pending motions are MOOT.

SIGNED at Houston, Texas, this *4th* day of June, 1993.

_____

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

*Julius J. Larry, III*
Attorney and Counselor at Law

River Oaks Tower
3730 Kirby Drive, Suite 1180
Houston, Texas 77098
(713) 942-0320
FAX (713) 942-0401

July 18, 1994

**VIA FACSIMILE**
**221-1212**

Mr. Scott V. Kneese
BRACEWELL & PATTERSON
2900 South Tower
Pennzoil Place
Houston, Texas 77002-2781

RE: Yarbrough, et al v. Phillips Petroleum Company, et al; Civil Action No. H-93-3592; In the United States District Court for the Southern District of Texas

Dear Mr. Kneese:

This letter is in response to your inflammatory letter dated July 1, 1994 and received by our office on July 5, 1994. Please be advised that the Yarbrough matter has merit. We did an investigation and concluded that Phillips Petroleum discriminated based on age and race during the 1992 lay-off and retaliated by causing Plaintiffs and the class to sign releases. We are not aware of any Supreme Court case that

held that an Employee must first return all of his or her severance pay before filing suit under the ADEA or WARN or Title VII.

Our research showed that there is a split among the Circuits regarding "tender back - ratification'. The Fifth Circuit ruled in Grillet and subsequent cases that employees must return their severance pay. However, the Grillet opinion has been widely criticized, as you well know. The Seventh Circuit, in Oberg reached the opposite conclusion from Grillet and Wamsley. Certiorari was demanded by the Supreme Court in Oberg.

I will ask the Court to continue its stay of the Yarbrough case until the Supreme Court decides this matter. It is my understanding that the Wamsley case, which involved similar facts, may reach the Supreme Court. Also, we will be filing the Petition for Writ of Certiorari in the Williams case, shortly. Especially, I intend to seek review of the unwarranted sanctions made by Judge Jerry Smith in the Williams case.

In the spirit of cooperation and protecting my clients interest, we will agree to a non-suit without prejudice, if you will agree not to raise statute of limitations defense. If the Supreme Court re-affirms its decision in Hogue and rules that there is no "tender-back" requirements, we would re-open the Yarbrough case and proceed to trial, releases notwithstanding.

Also, please review contracts law regarding "new promises" and modifications of agreements. You will find that a "new promise" must be supported by "new consideration". Unfortunately, our Circuit is filled with intellectual pygmies.

I also must caution you about your callous and reckless assertions that I submitted "fraudulent documents" to the Court. That is a blatant lie and I challenge you to produce a copy of every "fraudulent document" that I allegedly submitted to the Court.

Personal attacks on Plaintiffs' counsel will not excuse your clients' discrimination. We fully intend to prove discrimination by Phillips. As Plaintiffs' counsel, I will pay all sanctions. Until the Supreme Court tells me that I am wrong, I will be around. The die is cast!

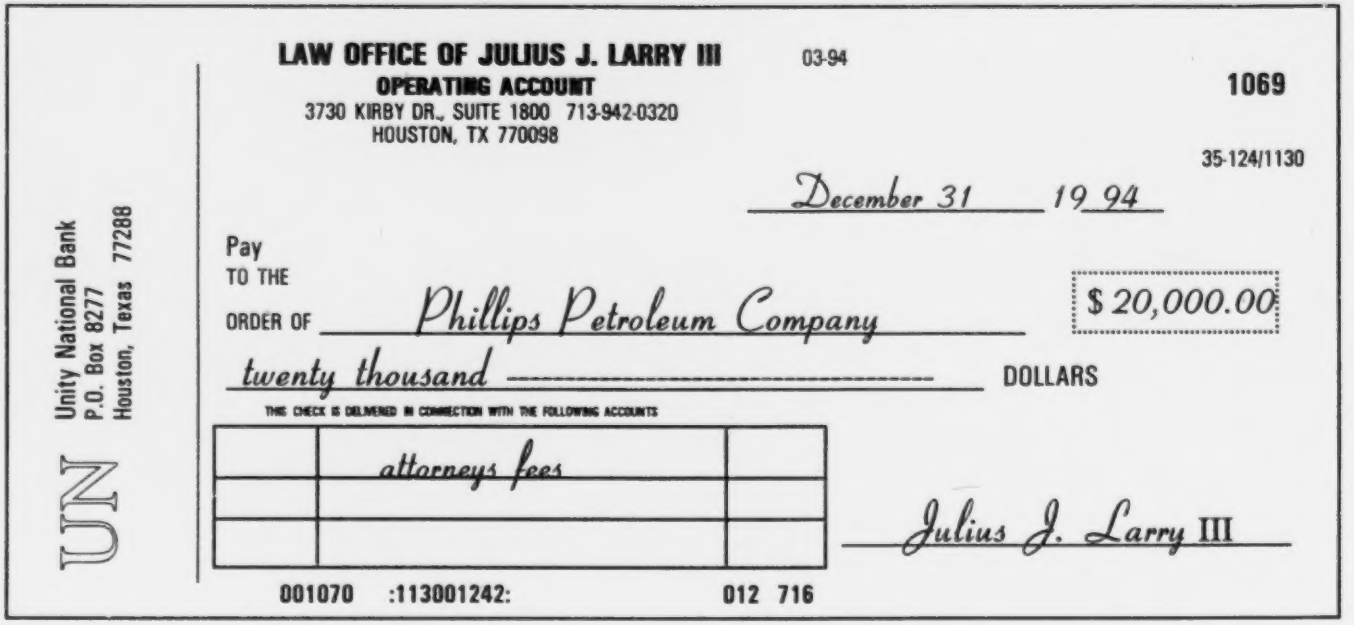
Enclosed please find checks in the amount of $20,000.00; $3,039.22 and $784.10 which represent sanctions by Judge Smith. If I am wrong, enjoy the money. If I am right, you can send it back.

Very truly yours,

Julius J. Larry, III.
Attorney at Law

JJL/kjs
Encl.

APPENDIX 4 - 1



LAW OFFICE OF JULIUS J. LARRY III
OPERATING ACCOUNT
3730 KIRBY DR., SUITE 1800 713-942-0320
HOUSTON, TX 770098

03-94

1069

35-124/1130

December 31 19 94

Pay
TO THE
ORDER OF Phillips Petroleum Company $ 20,000.00

twenty thousand ---------- DOLLARS

THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNTS

| | | |
|---|---|---|
| | attorneys fees | |
| | | |
| | | |

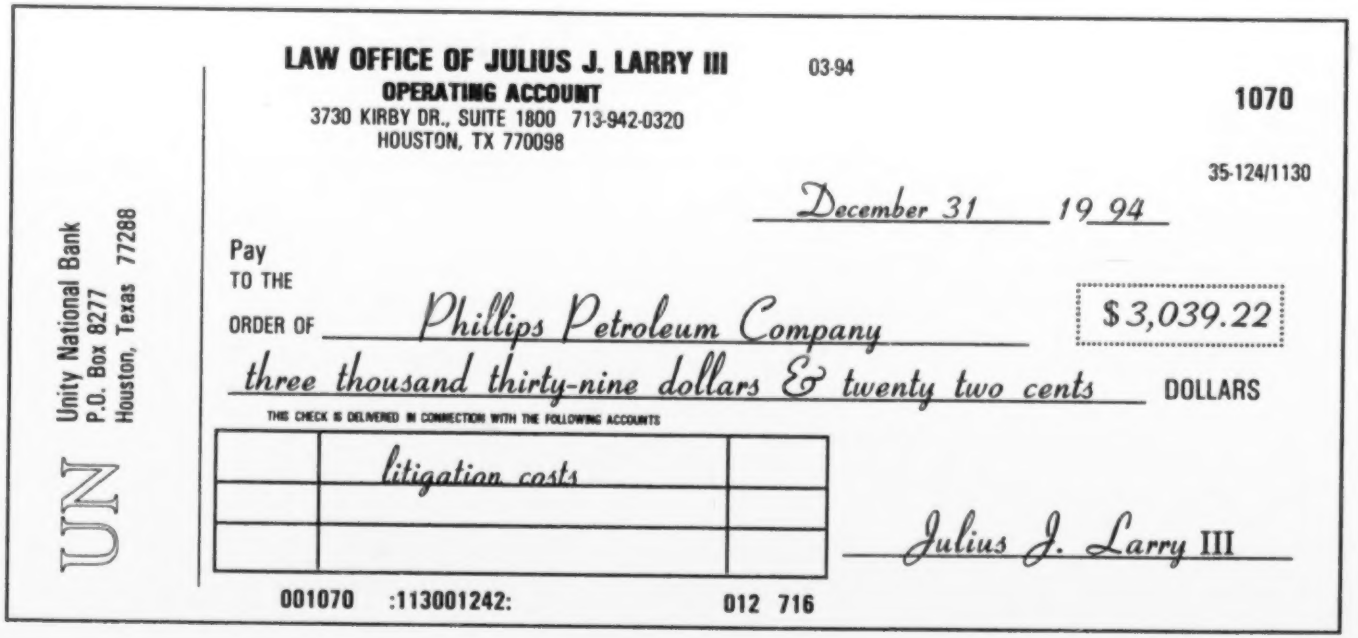
Julius J. Larry III

Unity National Bank
P.O. Box 8277
Houston, Texas 77288

UN

001070 :113001242: 012 716

APPENDIX 4 - 2



LAW OFFICE OF JULIUS J. LARRY III
OPERATING ACCOUNT
3730 KIRBY DR., SUITE 1800 713-942-0320
HOUSTON, TX 770098

03-94

1070

35-124/1130

December 31 19 94

Pay
TO THE
ORDER OF Phillips Petroleum Company

$3,039.22

three thousand thirty-nine dollars & twenty two cents DOLLARS

Unity National Bank
P.O. Box 8277
Houston, Texas 77288

UN

THIS CHECK IS DELIVERED IN CONNECTION WITH THE FOLLOWING ACCOUNTS

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| | litigation costs | |
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| | | |

Julius J. Larry III

001070 :113001242: 012 716